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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

V1300CR201080049

Plaintiff,

State's Objection to Defendant's Motion
to Vacate Mitigation Hearing

vs.

JAMES ARTHUR RAY,

(The Honorable Warren Darrow)

Defendant.

The State of Arizona, by and through Sheila Polk, Yavapai County Attorney, and her deputy undersigned, respectfully requests this Court deny Defendant's Motion to Vacate Mitigation Hearing. This Court set the dates for the Presentence Hearing on July 29, 2011. In doing so, this Court accommodated the requests of Defendant's counsel for a sentencing date in September based on their scheduling conflicts from August 19th through August 30th, 2011 and denied the State's request for a sentencing date in August. Further delays should not be granted by this Court. This objection is further supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Relevant History:

1 On June 22, 2011, the jury found Defendant guilty of three counts of negligent homicide
2 for the deaths of Kirby Brown, Lizbeth Neuman and James Shore. On June 30, 2011, the jury
3 found the State had proven the statutory aggravator of emotional harm to each of the victims'
4 immediate family. The jury also found the State had proven the non-statutory aggravator that
5 Defendant was in a unique position of trust with victim Lizbeth Neuman. The jury was hung on
6 the remaining aggravating circumstances alleged by the State. At the conclusion of the
7 aggravation hearing, sentencing was set for July 25, 2011.

9 On July 11, 2011, Defendant moved to vacate the sentencing date and set the matter for a
10 scheduling conference. This Court granted Defendant's motion, and a scheduling conference was
11 held July 29, 2011. At this hearing, this Court confirmed oral argument on Defendant's Motion
12 for New Trial would be held on August 16, 2011. In addition, Defendant requested a three-day
13 presentence hearing be set in September to accommodate Defendant's scheduling conflicts with
14 any dates from August 19th through August 30th. The State objected to Defendant's request and
15 urged this Court to set the presentence hearing and sentencing in August. Following the hearing,
16 this Court set the presentence hearing to occur over five days starting on September 19, 2011 and
17 continuing through September 23rd, 2011. Sentencing was set for September 26, 2011 at 2:30
18 p.m.

20 On August 16, 2011, oral argument was held on Defendant's Motion for New Trial and
21 the matter was taken under advisement.

22 Defendant's Motion to Vacate Mitigation Hearing was filed on September 6, 2011.

23
24 **Legal Argument:**

25 **The Law:**
26

1 Rule 26.3(a), Ariz. R. Crim. P., provides that in Superior Court, “[s]entence shall be
2 pronounced not less than 15 nor more than 30 days after the determination of guilt.” As noted in
3 the comment to the rule, there are two exceptions to the time limits. Under Rule 26.3(a), a
4 defendant may request to have his sentence pronounced earlier. According to the comment, this
5 exception is “to accommodate the out-of-town defendant who will be fined or placed on
6 probation and for whom it would be a needless hardship to be required to return at a later date
7 for sentencing.”

9 The second exception is pursuant to Rule 26.3(b), Ariz. R. Crim. P. This exception
10 allows a trial court to “reset the date of sentencing within 60 days after the determination of
11 guilt” when a pre-sentence hearing is requested. *Rule 26.3(b), Ariz. R. Crim. P.*

12 In addition to the above rules, Rule 26.7(c), provides that at a pre-hearing conference a
13 trial court “may postpone the date of sentencing for up to 10 days beyond *the maximum*
14 *extension permitted by Rule 26.3(b)* and delay the pre-sentencing hearing accordingly, in order
15 to allow the probation officer to investigate any matter specified by the court, or to refer the
16 defendant for mental health examinations or diagnostic tests.” (emphasis added).

17
18 **Legal Argument:**

19 **I. Defendant has already been granted a continuance past the maximum extension**
20 **permitted by Rule 26.3(b). Additional extensions should not be granted.**

21 The current scheduling of the pre-sentence hearing will commence 81 days after the
22 jury’s finding on the aggravators and 89 days after the jury found Defendant guilty of three
23 counts of negligent homicide. While the time limits of Rule 26.3 are not jurisdictional, *State v.*
24 *Carter*, 151 Ariz. 532, 534, 729 P.2d 336, 338 (App. 1986), all of the rules of criminal procedure
25
26

1 are "intended to provide for the just, speedy determination of every criminal proceeding." *Rule*
2 *1.2, Ariz. R. Crim. P.* The current dates for the presentence hearing were set on July 29, 2011 and
3 made allowances for Defendant's conflicts in setting a date in September over the State's
4 objection. From Defendant's motion, it appears that despite having notice of the date of hearing,
5 he has made no arrangements for any witnesses to appear.¹
6

7 "The granting of time extensions in the sentencing process should not be encouraged and
8 such delays should only be granted for good cause." *State v. Cornwall*, 114 Ariz. 502, 504, 562
9 P.2d 382, 384 (App. 1976). In the instant case, Defendant has had ample time to locate and
10 arrange for witnesses to appear at the hearing on the scheduled dates. The fact that he chose not
11 to do so pending this Court's ruling on the Motion for New Trial should not allow him to further
12 delay the sentencing proceeding.
13

14 **II. A continuance will violate the victims' constitutional right to a speedy disposition**
15 **of this case.**

16 Article II, § 2.1(10) of the Constitution of the State of Arizona, grants the victim of a
17 crime the right "[t]o a speedy trial or disposition and prompt and final conclusion of the case
18 after the conviction and sentence." In addition to the right to a speedy disposition, a victim has a
19 right to be present and to be heard at sentencing. Ariz. Const. art. II, § 2.1(3) and (4). A.R.S. §
20 13-4435(A), requires the court, prosecutor and law enforcement officials to take appropriate
21


22
23 ¹ At the hearing on July 29, 2011, Defendant advised this Court that he required three days to
24 conduct the presentence hearing. In the instant motion, Defendant makes reference to "several
25 dozen of witnesses," and on August 31, 2011, Defendant provided the State with a list of 27
26 potential mitigation witnesses. It is unclear how Defendant will present the testimony of "several
dozen" witnesses in the time allotted to him at the hearing. This concern prompted the State's
request for a pre-hearing conference filed on September 2, 2011.

1 action to ensure a speedy trial. Pursuant to the statute, a trial court "shall grant a continuance
2 only if extraordinary circumstances exist and the delay is indispensable to the interest of justice."
3 *A.R.S. § 13-4435(D)*. In addition, the statute requires that "before ruling on a motion for a
4 continuance, the court shall consider the victim's views and the victim's right to a speedy trial."
5 *A.R.S. § 13-4435 (F)*. Although the State can find no authority that sentencing is encompassed in
6 a victim's right to a speedy trial, in *State v. Burkett*, 179 Ariz. 109, 114. 876 P.2d 1144, 1149
7 (App. 1993), the Court of Appeals held that a defendant's right to a speedy trial pertains through
8 sentencing. The same reasoning may be applied when analyzing a victim's right to a speedy trial
9 and disposition of a case.
10

11 In the instant case, the victims' right to a speedy disposition has already been strained by
12 the scheduling demands of Defendant. The victims have made arrangements to be present at the
13 presentence hearing and to exercise their right to address this Court at sentencing. Granting
14 Defendant's request to vacate the hearing and rescheduling it once again would violate the
15 victims' constitution right to a speedy trial and disposition and should not be allowed.
16

17 RESPECTFULLY submitted this 8th day of September, 2011.

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19 SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

20
21 By 
22 **BILL R. HUGHES**
23 **DEPUTY COUNTY ATTORNEY**
24
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1 **COPIES** of the foregoing emailed this
2 8 day of September, 2011:

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COPIES of the foregoing delivered this
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